

ATTORNEYS FOR Debtor

In re:) Case No. 13-53491
272 E SANTA CLARA GROCERY, LLC,) CHAPTER 11
Debtor.) **DECLARATION**

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK & TRUST COMPANY (Claim No. 2)

1. I am the manager of Debtor 272 E SANTA CLARA GROCERY, LLC (“Debtor”). I am also the court appointed responsible person for the Debtor. I am also the one of the Investors as that term is described below and the principal of Investment Grade Loans, Inc. (“IGL”) as referenced hereinafter.

2. I submit this declaration of my own personal knowledge except as to those matters upon which I am informed and believe and as to those matters I am informed and believe them to be true. If called to testify as to the matters stated herein I could do so in an honest and

Case: 13-53491 Doc# 119-4 Filed: 12/13/13 Entered: 12/13/13 16:45:12 Page 1
of 17

competent manner. By way of this declaration I do not intend to or waive the attorney client and work product privileges.

3. This declaration is submitted as part of Debtor's AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK & TRUST COMPANY (Claim No. 2) ("Objection")

4. The following case background is presented as a summary to assist to the court with the Objection but omits some background and disputed history. Boston Private Bank & Trust Company ("BPB") and Borel Private Bank & Trust Company ("Borel") are used interchangeably or are referred to as BPB as I understand BPB either bought Borel Private Bank & Trust Company or is its successor in interest.

5. May 2009 Loan to Kimomex.

6. In May 2009, several investors (collectively the "Investors") loaned \$635,000 to Kimomex Santa Clara, LLC ("Kimomex") secured by a deed of trust in second position ("Second DOT") to Investment Grade Loans, Inc. ("IGL") as trustee against the Property. The Second DOT was subject to an existing first deed of trust in the amount of approximately \$3.6 million dollars recorded in July 2008 in favor of Boston Private Bank & Trust Company ("BPB") (formerly known as Borel Private Bank & Trust Company) (the "First DOT"). The Property consisted of 1.4 acres improved with a commercial building of approximately 26,575 square feet originally built in 1966 which was occupied by tenant Kimomex Markets, Inc. which operated a Mexican grocery store business.

7. July 2011 Foreclosure Agreement.

8. The Mexican grocery store business failed and Kimomex entered into protracted negotiations with a potential new grocery store tenant, i.e. Fresh & Easy, but that deal was never consummated. In March 2011 BPB recorded a notice of default under the First DOT and eventually set a trustee's sale for July 20, 2011.

9. On July 15, 2011, prior to the sale date, BPB and IGL entered into an "Agreement Re

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK & TRUST COMPANY

(Claim No. 2)

2

1 Foreclosure Sale” (the “Foreclosure Agreement”). Under the Foreclosure Agreement BPB
2 agreed that if IGL immediately paid \$380,661.90 to cure the arrearage BPB would postpone
3 the trustee’s sale to after August 17, 2011, and that if IGL made “the regular monthly
4 payment of \$24,307.45 due under the Loan” to keep the loan current, then BPB would
5 continuously postpone the trustee’s sale through March 16, 2012. The Foreclosure
6 Agreement also provided that the \$380,661.90 sum shall be applied to payments of principal
7 and interest now due, together with certain trustee’s fees, attorneys’ fees and other costs
8 owing to Borel as of the date of this Agreement . . .” On July 18, 2001, pursuant to the
9 Foreclosure Agreement, IGL paid BPB \$380,661.90 to reinstate and bring the loan current.
10 The Foreclosure Agreement acknowledges the Second DOT and at all times related to the
11 Foreclosure Agreement and thereafter BPB was aware of the Second DOT.

12 10. On June 30, 2011, prior to the Foreclosure Agreement, BPB’s agent PLM Lender
13 Services, Inc. (“PLM”) provided IGL with a reinstatement letter dated June 29, 2011 which
14 indicated, in part, the amounts necessary to reinstate the loan through July 15, 2011 and
15 specified a principal balance of \$3,487,501.16. A true and correct copy of this reinstatement
16 letter is attached hereto as Exhibit A. I negotiated the reinstatement and cure amount of
17 \$380,661.90 directly with Bruce Brown of BPB and based those negotiations on many
18 factors, including the asserted principal balance of \$3,487,501.16, that the regular monthly
19 was \$24,307.45, that the regular monthly payment consisted of principal and interest at 6.5%,
20 that the regular monthly payment of \$24,307.45 would keep the loan current, and without
21 knowledge of any environmental issues with the Property. IGL would not have foreclosed on
22 its Second DOT, entered into the Foreclosure Agreement on behalf of IGL, paid the agreed
23 reinstatement and cure monies of \$380,661.90 or paid the regular monthly payments of
24 \$24,307.45 to keep the loan current had the principal balance not been \$3,487,501.16, had
25 the payment of \$380,661.90 and the regular monthly payment of \$24,307.45 not reinstated,
26 cured, and kept the loan current, had the regular monthly payments of \$24,307.45 not been
27 based on interest at 6.5% and been applied to both principal and interest, had I been advised

28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

1 by BPB of the environmental issues with the Property, and had I been advised by BPB that it
2 may attempt to assert any right to thereafter backdate and/or re-apply the monies already paid
3 to it against alleged late fees, interest at \$8.5%, or other costs.

4 **11. October 2011 Foreclosure And Second DOT On Empty Building.**

5 12. In June 2011 IGL recorded a notice of default under the Second DOT. The foreclosure
6 took place on October 24, 2011. At the time of the sale, the unpaid balance was
7 \$1,183,908.74. At the sale, the Investors bid \$100,000, which was the highest bid, and
8 became the owners of the Property, leaving a deficiency balance due on the second loan of
9 \$1,083,908.74. At the time of the foreclosure, the building was empty, there was no tenant,
10 and there was no rental income. BPB was promptly made aware of the foreclosure on the
11 Second DOT.

12 13. Between October 2011 and March 2012, the Investors marketed the Property for lease
13 to potential tenants, found a tenant in March 2012, and eventually paid \$242,000 in leasing
14 commissions. At the same time IGL was paying BPB its regularly monthly payment of
15 \$24,307.45 per month to keep the loan current.
16

17 **14. First and Second Amendments to Foreclosure Agreement.**

18 15. In November 2011 and January 2012, IGL and BPB entered into a "First Amendment"
19 and a "Second Amendment to Agreement Re Foreclosure Sale" (the "Second Amendment").
20 Under the Second Amendment the parties agreed that if IGL made "the regular monthly
21 payments" for December 2011 through March 2012 of \$24,307.45 to keep the loan curent
22 then BPB would postpone the foreclosure sale, and if the Investors wanted to pay off the
23 First DOT, BPB would accept \$3.25 million dollars, less the payments made for those
24 months, in full satisfaction of the First DOT. The plan was to have the Property leased and
25 sold by March 2012 in order to pay off the First DOT. I negotiated these amendments
26 directly with Bruce Brown of BPB.
27

1 **16. March 2012-New Tenant and Third Amendment.**

2 17. In March 2012, the Investors formed 272 E Santa Clara Grocery, LLC (“Debtor”) and
3 deeded their respective ownership interests in the Property to the Debtor. The deed was
4 recorded in April 2012. BPB was promptly made aware of the transfer of such interest to the
5 Debtor (and such is reflected in the Fourth Amendment discussed hereinafter).

6 18. On or about March 8, 2012, Debtor, as landlord, entered into a 10-year lease for the
7 Property with Grocery Outlet, Inc., a national grocery store chain. During the first few years
8 the tenant pays rent of \$39,600 per month. The monthly rent was net of all expenses,
9 including property taxes, insurance, and maintenance (except the roof and structure) which
10 are all paid by the tenant.

11 19. In March 2012, BPB, IGL, and Debtor entered into a “Third Amendment to Agreement
12 Re Foreclosure Sale” (the “Third Amendment”). Under the Third Amendment, the parties
13 agreed that if BPB was paid “the regular monthly payment of \$24,307.45 due under the
14 Loan” to keep the loan current then BPB would postpone the trustee’s sale through
15 December 31, 2012. The parties further agreed that Plaintiff and Debtor would enter into a
16 Subordination, Non-Disturbance and Attornment Agreement (“SNDA”) under which BPB
17 would not disturb the tenant’s possession in the event BPB foreclosed, which SNDA was
18 signed on July 26, 2012. The Third Amendment was negotiated with Bruce Brown on behalf
19 of BPB.
20

21 20. In reliance upon the multiple agreements with BPB, Debtor continued to pay BPB
22 \$24,307.45 per month through and including March 2013 to keep the loan current. Thus,
23 from July 2011 through March 2013, Debtor paid Plaintiff \$380,661.90 to cure the arrearage
24 and bring the loan current, plus approximately \$413,219 in monthly payments for a total of
25 \$793,880.90 to keep the loan current. This is in addition to the approximate \$242,000 for
26 leasing commissions spent to find a tenant. Thus, a total of approximately \$1,033,880 was
27 spent in reliance upon the agreements with BPB.

28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

1 21. The Third Amendment indicated a principal balance on the loan of \$3,460,917.00.

2 22. IGL and Debtor would not have foreclosed on its Second DOT, entered into the
3 Foreclosure Agreement or subsequent amendments, paid the agreed reinstatement and cure
4 monies of \$380,661.90 to bring the loan current, or paid the regular monthly payments of
5 \$24,307.45 to keep the loan current had the principal balance not been \$3,487,501.16, had
6 the payment of \$380,661.90 and the regular monthly payment of \$24,307.45 not cured,
7 reinstated, and kept the loan current, had the regular monthly payments of \$24,307.45 not
8 been based on interest at 6.5% and been applied to both principal and interest, had I been
9 advised by BPB of the environmental issues with the Property, and had I been advised by
10 BPB that it may attempt to assert any right to thereafter backdate and/or re-apply the monies
11 already paid to it against alleged late fees, interest at 8.5%, or other costs.

12
13 **23. December 2012-Sale of Property and Debtor's Discovery of Environmental
14 Contamination and BPB's Non-Disclosure.**

15 24. In November 2012, Debtor found a buyer and entered into a contract for the sale of the
16 Property for \$7.3 million dollars. The escrow was scheduled to close in December 2012. This
17 sale would have paid off BPB's lien. However, during their due diligence, the buyer
18 discovered that the Property was listed with the State and/or County as undergoing clean-up
19 or investigation due to a possible leak from an old underground storage tank. Specifically,
20 while conducting a Phase I, Environmental Investigation, the buyer discovered the existence
21 of prior reports filed showing that the Property was contaminated. As a result of the
22 discovery, the buyer cancelled the sale.

23 25. This discovery by the buyer was the first notice that Debtor had of any contamination on
24 the Property. However, Debtor was informed that BPB had been aware of the contamination
25 since 2008, had a copy of a report showing purported contamination, and never disclosed the
26 report or the purported contamination to Debtor. Had BPB disclosed this information to
27 Debtor, Debtor would not have paid BPB \$793,880 to cure the default, made the regular

28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

1 monthly payments under the First DOT to keep the loan current, or invested another
2 \$242,000 in leasing commissions to find a tenant. In addition, had BPB disclosed this
3 information, not affirmatively acknowledged the declining principal (\$3,460,917.00 in the
4 Third Agreement), not reinstated or treated the loan as current, not based the regular monthly
5 payment of \$24,307.45 on 6.5% and applied such payments to interest and principal, or
6 asserted any right to thereafter backdate and/or re-apply the monies already paid to it against
7 alleged late fees, interest at 8.5%, or other costs then IGL and Debtor would not have
8 entered into the Foreclosure Agreement or taken any of the actions described herein.

9 **26. May 2013-Proposed Fourth Amendment, Agreement to Suspend Payments, and**
10 **Release of Claims.**

11 27. Debtor continued to make the monthly payments of \$24,307.45 to BPB through March
12 2013 to keep the loan current. Around that time, BPB, IGL and Debtor negotiated the terms
13 for a fourth amendment regarding the foreclosure sale. Under the terms as negotiated,
14 Plaintiff agreed that so long as Debtor and IGL took certain steps to obtain a “closure and/or
15 no further action letter” regarding the contamination from the required regulatory agency,
16 and to the extent required, pay for any additional environmental investigation, testing,
17 remediation and/or other work, kept BPB apprised of the progress, and obtained a “closure
18 and/or no further action letter” resolving all environmental issues no later than April 30,
19 2014, then no monthly payments after March 2013 would be due, and the foreclosure sale
20 would be continued through April 30, 2014. I negotiated this amendments directly with
21 Bruce Brown of BPB.

22 28. In reliance upon the agreement that no payments were due after March 2013, Debtor did
23 not make payments pending the drafting and execution of the fourth amendment. The draft
24 fourth amendment was not received until May 2013. Consistent with the negotiations, the
25 draft fourth amendment stated that no payments would be due after March 2013. However,
26 contrary to prior discussions, the proposed “Fourth Amendment to Agreement Re
27 Foreclosure Sale” (the “Fourth Amendment”), required Debtor, IGL, and their predecessors

1 to release BPB from any claims relating to the Property including any environmental issues.
2 As BPB had failed to disclose the environmental contamination to Debtor prior to and during
3 its dealings and did not know the severity of the contamination and cost of remediation,
4 Debtor refused to execute the Fourth Amendment. The Fourth Amendment, prepared by BPB
5 and presented to Debtor for signature, indicated a principal balance on the loan of
6 \$3,341,017.00.

7 29. In late January or early February 2013 and at my direction my staff contacted BPB
8 because Debtor needed payment information for its tax returns and had not received a 1098
9 or similar form from BPB. On February 4, 2013 Debtor received a facsimile from BPB
10 consisting of a payment history on the loan. The payment history reflects a payment history
11 for 12/27/11 through 12/31/12, a principal balance of \$3,460,916.67, regular monthly
12 payments of \$24,307.45, but an allocation of the payment only to interest and at 8%. A true
13 and correct copy of this fax is attached hereto as Exhibit B. Therefore, I contacted Bruce
14 Brown of BPB, indicated that the payment history was incorrect in terms of the interest rate
15 and application of the regular monthly payment to interest and principal, and asked that the
16 errors be corrected immediately and made consistent with our agreement that the loan was
17 brought current and kept current by the prior payments so Debtor could prepare its tax
18 returns. Mr. Brown agreed to correct the errors. On February 25, 2013 Bruce Brown emailed
19 an adjusted amortization schedule which referenced the loan, the payment history from July
20 19, 2011 through February 15, 2013, the interest rate at 6.5%, the regular monthly payment
21 of \$24,307.45, the application of the regular monthly payment to principal and interest at
22 6.5%, a declining principal balance, and a principal balance of \$3,347,194.03. A true and
23 correct copy of this Amortization Schedule is attached hereto as Exhibit C. Debtor secured
24 this amortization schedule from BPB for its 2012 taxes, reasonably relied upon this
25 information, and used this information for its 2012 tax returns.

26 //
27
28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

1 **30. May 13, 2013-BPB Serves Demand on Tenant to Pay All Rents to BPB.**

2 31. On or about May 17, 2013 BPB served a “Demand That You Pay Rent To A Party
3 Other Than The Landlord” on the tenant. Debtor received confirmation that the tenant would
4 comply with the demand and pay all rents directly to BPB. In compliance with the demand
5 and commencing June 2013, BPB received and continues to receive all the rent, i.e. \$39,600,
6 directly from the tenant (this rent was about \$15,300 more than the regular monthly
7 payment). Pre-petition Debtor tendered, and continued to tender, immediate payment of the
8 total arrearage, thereby bringing and maintaining the loan current. BPB wrongfully rejected
9 this tender.

10 **32. State Court Action.**

11 33. On June 10, 2013, BPB filed a Verified Complaint For (1) Judicial Foreclosure; And (2)
12 Specific Performance And Appointment of Receiver commencing a state court action against
13 Kimomex and Debtor, Santa Clara County Superior Action No.: 1-13-CV-247961 (“State
14 Court Action”) and wherein BPB, under penalty of perjury, repeatedly asserted “As of June
15 10, 2013, there is due, owing and outstanding under the Promissory Note the principal
16 amount of \$3,341,017.20 . . .” (sic). Although the State Court Action does not acknowledge
17 the prior agreements and prior payments, it does not assert or quantify any claim for default
18 interest. This principal figure appeared consistent with the information provided to us by
19 BPB and the agreements with BPB and Debtor and I reasonably relied upon this information.
20

21 **33. Bankruptcy.**

22 34. On June 27, 2013, Debtor commenced this Chapter 11 bankruptcy case (“Bankruptcy
23 Case”). No Receiver or Trustee has been appointed, and the Debtor remains a Debtor in
24 Possession pursuant to 11 U.S.C. under Chapter 11 of title 11, United States Code sections
25 1107 and 1108. The bankruptcy was filed to avoid the unnecessary and expensive
26 appointment of a receiver, to prevent BPB’s pending foreclosure, and protect Debtor’s
27

1 substantial investment and substantial equity.

2 35. On September 24, 2013, Debtor filed a disclosure statement and plan with a hearing
3 date of November 7, 2013 (Doc#62). On October 7, 2013, the court issued an Order Denying
4 Motion for Order Confirming No Stay with Respect to Rent and Denying Cross-Motion for
5 Use of Cash Collateral (Doc#64).

6 36. On October 7, 2013, this court issued an Order Denying Motion for Order Confirming
7 No Stay with Respect to Rent and Denying Cross-Motion for Use of Cash Collateral
8 (“Order”)(Doc#64) which, in summary confirmed Debtor’s position that the post-petition
9 rental income was property of the estate pursuant to Bankruptcy Code 541 and cash collateral
10 of BPB and may not be used by Debtor absent consent of BPB or order of the court.

11 37. Debtor attempted to secure an agreement with BPB regarding the use of cash collateral,
12 prior to and after this court’s Order, but BPB refused to consent¹ to Debtor using such funds
13 to pay BPB its contractual interest and regular monthly payment of \$24,307.45 for the post-
14 petition months of July-October and thereafter as monthly rental income of \$39,600 was
15 received from Debtor’s tenant, to pay United States Trustee Quarterly Fees as invoiced by the
16 United States Trustee (“UST”), and to hold the balance of such funds in Debtor’s DIP
17 account pending an agreement with BPB and/or an order from this court and without
18 prejudice to the rights of BPB or Debtor. Debtor’s Motion to Use Cash Collateral Filed by
19 Debtor 272 E Santa Clara Grocery, LLC (Doc#80) was amended following Debtor’s sale of
20 real property.

21 **38. Status of Environmental Issue.**

22 39. Debtor contracted with ERAS Environmental, Inc. (“ERAS”) to assist Debtor address
23 the environmental issues and secure government clearance so the Property can be sold. On
24 August 26, 2013 the Santa Clara County Department of Environmental Health (“DEH”)
25 advised Debtor that based on their review it appeared that the Property qualified for closure

26
27 ¹BPB orally refused to consent to the use of such funds and then refused to consent to use of
28 such funds in writing (twice).

1 under State Water Resource Control Board Low-Threat Underground Storage Tank Case
2 Closure Policy ("LTCP"), no further action was required at that time, and the matter would
3 proceed through the closure process which it continues to do.

4 40. On July 12, 2013, BPB, through David Scheiber, Senior Vice President- Special Assets
5 Department of BPB, filed a declaration, under penalty of perjury, and asserted that the
6 outstanding balance due and owing by Debtor to BPB on the First DOT as of June 27, 2013
7 totaled \$3,341,017.20. Specifically, BPB asserted "As of June 27, 2013, the outstanding
8 principal balance due and owing from Kimomex under the Promissory Note and other Loan
9 Documents is \$3,341,017.20." ("Scheiber Declaration")(Docket#22-2, entered July 12, 2013,
10 page 3, paragraph 7). This principal figure appeared consistent with the information provided
11 to us by BPB and the agreements with BPB and Debtor and I reasonably relied upon this
12 information.

13 41. On July 30, 2013 BPB filed a Reply in Support of its Ex Parte Applications for Orders
14 of Examination and for Production of Documents Pursuant to Bankruptcy Rule 2004, in
15 support of numerous 2004 applications (Docket#31-36 and 41) asserting "BPB holds the
16 senior lien on the Property securing a loan with an outstanding principal balance of
17 \$3,341,017.20". (Docket#42, entered July 30, 2013, page 3, lines 7-8) At the same time BPB
18 also re-filed the Scheiber Declaration to support the alleged principal balance of
19 \$3,341,017.20. (Docket#31-3, entered July 30, 2013, page 3, paragraph 7). This principal
20 figure appeared consistent with the information provided to us by BPB and the agreements
21 with BPB and Debtor and I reasonably relied upon this information.

22 42. On August 12, 2013 BPB filed an additional 2004 application and asserted "BPB holds
23 the senior lien on the Property securing a loan with an outstanding principal balance of
24 \$3,341,017.20. (Counsel Decl. Exh. 1 ("Scheiber Declaration"), at ¶7.)" (Docket#45, page 2,
25 paragraph 3). This principal figure appeared consistent with the information provided to us
26 by BPB and the agreements with BPB and Debtor and I reasonably relied upon this
27 information.

1 43. On August 14, 2013 BPB filed Secured Creditor Boston Private Bank & Trust
2 Company's Opposition to Debtor's Cross Motion for Use of Cash Collateral and asserted
3 "As of the Petition Date, the outstanding principal balance due and owing from Kimomex to
4 BPB under the Note and other Loan Documents was \$3,341,017.20." (Docket#50, page 4,
5 lines 6-9). This principal figure appeared consistent with the information provided to us by
6 BPB and the agreements with BPB and Debtor and I reasonably relied upon this information.

7 44. On October 15, 2013 BPB filed a Declaration of Counsel In Support of Opposition to
8 Ex Parte Application For Order Directing Boston Private Bank & Trust Company's
9 Production of Documents Under Bankruptcy Rule 2004 and asserted "BPB holds the senior
10 lien on the certain leased real property located at 272 E. Santa Clara Street, San Jose, Ca. (the
11 "Property") securing a loan with an outstanding principal balance of \$3,341,017.20".
12 (Docket#51, page 5, lines 3-5). This principal figure appeared consistent with the
13 information provided to us by BPB and the agreements with BPB and Debtor and I
14 reasonably relied upon this information.

15 45. BPB consistently provided Debtor with confirmation of the principal amount owed
16 under the loan and First DOT and how much it would cost to bring and keep the loan current
17 and Debtor and I reasonably relied upon this representations. Debtor would not have pursued
18 foreclosure of its Second DOT, the various agreements with BPB, secured a tenant, or paid
19 BPB and various related expenses totaling approximately \$1,033,880 (\$380,661.90 to BPB to
20 cure and reinstate the loan, \$242,000 in leasing commissions, and \$413,219 to BPB
21 (\$24,307.45 from July 2011-March 2013) for regular monthly payments of principal and
22 interest to keep the loan current if the principal, interest, and interest rate were not as agreed
23 with BPB or as represented by BPB. Debtor rightfully relied upon BPB's representations of
24 principal, interest, and interest rate as discussed herein and as reflected in its June 2011
25 reinstatement letter (principal \$3,487,501.16), in the March 2012 BPB Third Amendment
26 (principal \$3,460,917.00), its February 2013 Amortization Schedule (principal
27 \$3,347,194.03), in the March 2013 Fourth Amendment (principal \$3,341,017.00), and

28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

12

1 various other documents .

2 46. Yet, just as Debtor proceeded to sell the Property BPB filed the BPB Claim and
3 asserted, contrary to all prior declarations and documents, that “As of the petition date, the
4 outstanding principal due and owing from Kimomex under the Promissory Note and other
5 Loan Documents is \$3,555,168.55 (Proof of Claim No. 2, page 5). Suddenly, as Debtor
6 moves to sell the Property, a \$214,151.35 (\$3,555,168.55-\$3,341,017.00) difference in the
7 claimed principal arises and said difference is reflected between BPB’s agreements with
8 Debtor, documents BPB provided Debtor, the Verified Complaint in the State Court Action,
9 and repeatedly filed declarations and representations made in this bankruptcy case on the one
10 hand and the BPB Claim on the other hand.

11 47. The principal claim is overstated and contradicts the repeated, sworn and represented
12 amount of outstanding principal by at least \$214,151.50 and thus results in an overstatement
13 by any calculation of interest, whether it be contract interest at 6.5% or alleged default
14 interest at 8.5%, relative to the overstated principal.

15 48. The BPB Claim also asserts two different interest totals, \$217,401.61 as of October 15,
16 2013 and \$242,584.05 as of November 15, 2013 a difference of \$25,182.44. Both figures are
17 miscalculated.

18 49. On November 8, 2013 Debtor, pursuant to the court’s October 30, 2013 Order
19 Granting Motion to Sell Real Property (272 E. Santa Clara St.) Free and Clear of Liens and
20 Pay Broker/agent (Docket#89), paid BPB \$3,341,017.20 in principal. BPB has not amended
21 the BPB Claim to acknowledge such principal payment.

22 50. The BPB Claim was, admittedly, backdated. Debtor rejects the explanation for the
23 backdating as “based on a proper allocation of prior payments” as alleged therein. Debtor
24 submits that BPB, in an effort to improperly maximize its recovery, backdated its
25 calculations.

26
27 51. BPB failed to put Debtor on notice of its intention to accelerate the note and seek
28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

13

1 default interest. In fact, BPB did the opposite.

2 52. BPB was aware of Debtor's junior deed of trust on the Property and did not assert any
3 objection relative thereto, negotiated and entered into various agreements with Debtor
4 wherein BPB specified the amounts necessary to cure arrears and reinstate the loan and keep
5 the loan current and accepted these payments from Debtor over the course of approximately
6 two years without objection, was aware of Debtor's foreclosure on its junior deed of trust on
7 the Property and did not assert any objection relative thereto, was aware of Debtor's efforts
8 to ready the Property to secure a tenant and that it had secured a tenant and did not assert any
9 objections relative thereto, was aware of Debtor's efforts to market and sell the Property and
10 of its December 2012 sale and did not assert any objection relative thereto, continued to
11 accept regular monthly payments from Debtor without objection or reservation, and at no
12 time prior to the commencement of this case did BPB ever assert, mention, reference, or
13 claim default interest.

14 53. In reliance thereon, Debtor foreclosed on its junior deed of trust, paid substantial
15 monies to BPB to cure its arrears and reinstate the loan, paid substantial monies to BPB to
16 maintain its regular monthly contractual payment, paid substantial monies to others to ready
17 the Property for a tenant and to secure a tenant, and marketed the Property for sale and
18 secured a buyer-only to have the sale fall through due to BPB's non-disclosure of the
19 environmental issue. Similarly, BPB consistently provided Debtor with confirmation of the
20 declining principal amount owed under the loan and First DOT upon which Debtor
21 reasonably relied. Debtor would not have pursued foreclosure of its Second DOT, the various
22 agreements with BPB, secured a tenant, or paid BPB and various related expenses totaling
23 approximately \$1,033,880 (\$380,661.90 to BPB to cure and reinstate, \$242,000 in leasing
24 commissions, and \$413,219 to BPB (\$24,307.45 from July 2011-March 2013) for regular
25 monthly payments of principal and interest to keep the loan current if the principal was not as
26 represented by BPB, the regular monthly payment of \$24,307.45 was not being applied to
27

28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

1 principal and interest at 6.5%, or had I been advised by BPB that it may attempt to assert any
2 right to thereafter backdate and/or re-apply the monies already paid to it against alleged late
3 fees, interest at 8.5%, or other costs. Debtor rightfully and reasonably relied upon BPB's
4 representations of principal and interest including as reflected in its June 2011 reinstatement
5 letter (principal \$3,487,501.16), the March 2012 BPB Third Amendment (principal
6 \$3,460,917.00), its February 2013 Amortization Schedule (principal \$3,347,194.03 and
7 interest at 6.5%), and the March 2013 Fourth Amendment (principal \$3,341,017.00).

8 54. Debtor cured and reinstated the loan as agreed, kept the loan current, and all curable
9 or other defaults were waived by BPB.

10 55. The BPB Claim improperly asserts late fees notwithstanding Debtor reinstated the
11 loan and cured BPB's claimed monetary defaults in approximately July 2011 and caused
12 timely regular monthly payments to be made thereafter and through present to keep the loan
13 current, including those payments intercepted by BPB from Debtor's tenant and/or that which
14 BPB refused to accept. The BPB Claim asserts late fees of \$1,215.37 a month from July 19,
15 2011 to October 15, 2013 and totaling \$34,030.36 as of November 15, 2013. Yet, the same
16 BPB Claim simultaneously asserts payments made from July 19, 2011 through March 15,
17 2013, fails to acknowledge a March 2013 agreement between BPB and Debtor that monthly
18 payments need not be made, fails to acknowledge that pre-petition BPB received the June
19 2013 rent payment of \$39,600 following BPB's May 17, 2013 BPB Demand That You Pay
20 Rent To A Party Other Than The Landlord, and fails to acknowledge that post-petition BPB
21 intercepted \$39,600 for four consecutive months (July-October 2013) totaling \$158,400
22 (\$39,600 x 4) and then refused to accept regular monthly contract payments of \$24,307.45
23 from Debtor for the months of July-October 2013 and thereafter as Debtor's tenant paid its
24 monthly rent. Debtor filed a Motion for Use of Cash Collateral because BPB refused to
25 accept such payments.

26 56. BPB has no basis to charge Debtor late fees. As stated hereinabove, Debtor reinstated

27
28 **DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY**

(Claim No. 2)

15

1 the loan, cured the non-monetary defaults, and kept the loan current as agreed, BPB received
2 overpayments from Debtor's tenant or simply refused to accept payments, and Debtor only
3 stopped making payments pursuant to a verbal agreement with BPB that no payments needed
4 to be made until the environmental issue relative to the Property could be resolved (as
5 referenced in the Fourth Amendment Re Foreclosure Sale) and then BPB intercepted, kept,
6 and should have applied the April, May, and June 2013 \$39,600 each (\$118,800) and then
7 wrongfully intercepted, held without applying payments against the loan, belatedly turned
8 over to Debtor rents for July-October 2013, but then refused to accept payments for July-
9 October and thereafter from Debtor at \$24,307.45 per month.

10
11 57. Debtor submits that it has multiple claims against BPB. Some non-exclusive examples
12 are worth noting.

13 58. BPB was put on notice of the commencement of this bankruptcy on June 27, 2013, the
14 petition date, filed a Request For Notice within three days of the bankruptcy filing Doc# 11,
15 and had clear notice of the bankruptcy and of the automatic stay. Yet, BPB refused and failed
16 to cease its collection actions against Debtor by not advising Debtor's tenant that post-
17 petition rental payments should be made directly to Debtor, continuing to intercept rent
18 payments, filing an unsuccessful motion to determine that such post-petition rents were not
19 property of the estates notwithstanding authority to the contrary, delaying the turnover of
20 such funds after receipt of the court's October 7, 2013 order finding such post-petition rents
21 are property of the estate, not advising Debtor's tenant to direct post-petition rental payments
22 directly to Debtor after receipt of the court's October 7, 2013 order, and refusing to accept
23 payments from Debtor. Preliminarily, BPB's violations of the automatic stay have resulted
24 in damages to Debtor, including but not limited to, damages in the form of attorney's fees
25 and costs, claims of additional interest and late fees and attorney's fees and costs by BPB,
26 and punitive damages.

27 59. Debtor, as discussed in its Schedule B, asserts that it has a claim against BPB for
28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)

16

1 BPB's failure and refusal to disclose to Debtor, prior to, during, and after, the various
2 agreements between them and while Debtor was making substantial payments to BPB and
3 others while BPB knew the Property had a material environmental issue.

4 60. As a result of BPB's non-disclosure and withholding of such material information,
5 Debtor paid considerable monies to BPB and incurred substantial expenses to bring and keep
6 BPB current, paid substantial monies to others ready the Property for a tenant and secure a
7 tenant, and paid substantial monies to ERAS Environmental, Inc. to assist Debtor secure a
8 No Further Action letter from the County of Santa Clara. In addition, as a result of BPB's
9 non-disclosure and withholding of such material information Debtor lost a sale of the
10 Property in December 2012, incurred, paid, and/or will incur and/or pay substantial
11 additional interest to BPB (approximately \$291,689.40 (12 x \$24,307.45, December 2012-
12 November 2013), substantial additional interest and penalties on outstanding real property
13 taxes (18% interest and penalties estimated in excess of \$50,000 since December 2012), and
14 substantial attorney's fees and costs, and may have lost interest and/or profits on the net
15 proceeds of a sale of the Property.
16

17 I declare under penalty of perjury that the foregoing is true and correct and that this
18 declaration was executed at Los Altos, California, on December 12, 2013.

19 /s/ Andrew A. Lewis
20 Andrew A. Lewis
21
22
23
24
25
26
27
28

DECLARATION OF ANDREW A. LEWIS RE: AMENDED OBJECTION TO PROOF OF CLAIM OF BOSTON PRIVATE BANK &
TRUST COMPANY

(Claim No. 2)